IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

WIRT K. WINTON,
Administrator of the
ESTATE OF CHARLES F. WINTON,
Deceased, and Others,
Appellants,
vs.
JACK AMOS AND OTHERS KNOWN
AS THE MISSISSIPPI CHOCTAWS.

No. 6 - 45

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANTS

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STATEMENT

This is an appeal from the Court of Claims. The points involved are fully stated in the assignment of errors hereinafter set out. A resume of the facts, however, is as follows:

By the Treaty of 1830 the United States confirmed a grant of land to the Choctaw Indians; a vast territory comprising substantially the southern half of Indian Territory.

The Government desired the Choctaws to move out of Mississippi to this western country. Article XIX of this treaty gave special individual grants to leading Indians, nearly all of whom were of mixed blood, in Mississippi; they separating themselves from the Choctaw Nation and its future. R. 98. By Article XIV a number of full-blood Choctaw Indians who were desirous of remaining in Mis-

sissippi and yet desired to retain their citizenship in the Choctaw Nation west, were provided for. By Article XIV these Indians retained the right to assert their citizenship in the Choctaw Nation west, a right subsequently construed by the United States to mean that they must remove to the west in order to enjoy the right of citizenship. R. 97-98. The Article XIV claimants always insisted that they had the right to remain in Mississippi while enjoying citizenship in the Choctaw Nation west, but were overruled in a decision of the U. S. District Court in Oklahoma in the case of Jack Amos, et al., *vs.* the Choctaw Nation, confirmed by this Court in the *Stevens' case,* 174 U. S. 445 (R. 102). After the Stevens' case was decided, those Mississippi Choctaws (Article XIV claimants), were compelled to abandon this contention and yield to the requirement of removal.

Up to 1893 the Western Choctaws recognized the rights of the Article XIV claimants to remove from Mississippi to the Choctaw Nation west, establish residence there, and become citizens of the Choctaw Nation. R. 160, 161.

In 1893 the policy of the United States was declared to divide up and allot the lands of the Choctaw Nation to its citizens including the Chickasaws, who had been merged by the Treaty of 1855 with the Choctaws, and thereafter the Western Choctaws recognizing that the Choctaw Nation as a nation was about to cease, *refused* to recognize the right of the Article XIV claimants or of any Choctaws in Mississippi to remove to the west, and they were confirmed in this attitude by the authorities of the United States. R. 161.

In 1896 some of the Mississippi Choctaws appealing to Hon. J. S. Williams, representing a district in Mississippi where many of these people lived, persuaded him to write to the Commissioner of Indian Affairs asking

whether or not these people, after the lapse of 63 years, had the right to assert citizenship in the Choctaw Nation, or participate in their property rights. He was told they had no such right. Again, in December of 1896, he desired to be informed if Mississippi Choctaws who moved to the Choctaw Nation west and established a residence there, would be recognized, and he was advised by the Commissioner of Indian Affairs that they were subject to summary removal if they attempted to do so before having previously been admitted to citizenship by the Choctaw authorities. R. 101.

It was this denial of the right of the Mississippi Choctaws that made it necessary for them to be represented by competent attorneys, qualified to present their case to the proper officials of the Choctaw Nation, the legislative, judicial and executive officers of the United States.

Robert L. Owen had been United States Indian Agent and had had general supervision of the Choctaws and Chickasaws. He was peculiarly versed in a knowledge of their treaties. He had been practising law for many years in Oklahoma; was Secretary of the first Bar Association, organized upon the establishment of the United States Court at Muskogee in 1890. He knew the rights of these people, and he made an association with Charles F. Winton, a citizen of Kansas, by which in June, 1896, Winton contracted to go to Mississippi and see the Mississippi Choctaws in person, explaining to them their rights, and undertake to write up contracts. Owen contracted to furnish the *forms* (*not funds*) of the contracts, and "to represent the claims of these people before the proper officers of the United States or Indian Government," with the assistance and co-operation of Winton. R. 100, 213-214.

Winton went to Mississippi, found the Mississippi Choctaws very ignorant and very shy, and he had the greatest trouble in having them realize the difficulties confronting them, or to excite their interest in defending their rights. The contracts were never asserted anywhere as having any other value than a power of attorney to represent the interests of the Mississippi Choctaws, and no attempt was ever made to demand the terms of the contracts or to ask more than compensation, *quantum meruit,* for services actually rendered, and expenses. R. 100.

The request for payment for services rendered was presented to Congress in 1906, when the work had been completed, and Congress passed a jurisdictional act, authorizing, in 1906 after ten years of service, the Court of Claims

"to hear, consider and adjudicate the claims against the Mississippi Choctaws of the Estate of Charles F. Winton, deceased, his associates and assigns for services rendered and expenses incurred in the matter of the claim of the Mississippi Choctaws to citizenship in the Choctaw Nation, and render judgment thereon on the basis of quantum meruit, in such amount or amounts as may appear equitable."

"Or justly due therefor,

"Which judgment, if any, shall be paid from funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the Governor of the

Choctaw Nation and the Attorney General shall appear and defend the said suit on behalf of said Choctaws." R. 96.

The request for the above jurisdictional act was made by Winton and his associates, showing that Winton only sought what was just for services rendered.

Congress in June, 1896, authorized the Dawes Commission to make up a roll of the citizens of the Choctaw Nation. R. 99-100.

Winton immediately afterwards went to Mississippi, made a contract with Jack Amos and a number of others, and took their sworn statements of their being full-blood Choctaw Indians, claiming rights under the Article XIV. R. 100.

In September, 1896, Robert L. Owen, an attorney-at-law in good standing, in his professional capacity appeared before the Dawes Commission and presented the claim of Jack Amos and a number of other full-blood Mississippi Choctaws, all claimants under Article XIV, and demanded the right of enrollment under this said Article XIV of the Treaty of 1830, as full-blood Choctaw Indians. Upon an *argument* of the case he submitted evidence showing that the parties were full-blood Choctaw Indians, speaking the Choctaw language, and entitled under Article XIV of the Treaty of 1830 to retain their rights in the Choctaw Nation west. The Dawes Commission rendered formal judgment against them on the theory that they were not residents of the Choctaw Nation. R. 102.

The said Owen in his professional capacity then prepared an appeal to the United States Court for Indian Territory, Judge W. H. H. Clayton presiding. Judge Clayton presented a formal opinion declaring that the Mississippi Choctaws not having previously removed to Oklahoma were not entitled to citizenship, but had forfeited their rights

by such failure to move. Yet the head of the Indian Office had stated that if they had removed they would have been subject to summary arrest and would have been ejected as intruders. R. 102.

An appeal was effected from the judgment of Judge Clayton and presented to this Court by Winton and his associates. This Court did not pass upon the merits of the case, but merely held that the decision of the United States Court in Indian Territory was final under the Statute. *Stevens' Case*, 174 U. S., 445.

In the meantime Winton and his associates presented the matter to the legislative authorities of the United States in Congress by printed memorials, the only way in which it could be done. In December, 1896, they presented a memorial on behalf of the Choctaw full-blood Indians, residing in Mississippi, speaking the Choctaw language, and entitled under the Article XIV to citizenship in the Choctaw Nation west, and offered evidence in support of their contention in the form of a copy of a statute of the Choctaw Nation west, dated December 14, 1890, in which the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation west was formally set up by the legislative authorities of the Choctaw Nation and approved by the Principal Chief. R. 101, 102, 109.

This professional service was immediately followed by a more elaborate brief in behalf of the full-blood Choctaws living in Mississippi in January, 1897 (R. 155-159), and in December following, by a similar memorial at much greater length, submitted to the executive department through the Secretary of the Interior. Winton and his associates confined themselves to representing the interests of the full-blood Mississippi Choctaws and the children of their immediate families. In some cases these children were of mixed blood but of full-blood families. When the con-

troversy was finally settled none but the full-blood Mississippi Choctaws were admitted to citizenship in the Choctaw Nation west. Only those clients represented by Winton and his associates were admitted to the Choctaw Nation west, and from 1906 to 1918 no other full-bloods have been admitted to citizenship by the authorities of the United States, although a resolute effort has been made every year since to secure such admission.

Winton and his associates on authority of the agreements madé with 2,000 Mississippi Choctaws, assumed to represent the Mississippi Choctaws as a class entitled under Article XIV, they having no tribal organization by which they could be represented except upon individual authority. R. 112.

In February, 1897, acting in their professional capacity, Winton and his associates prepared a bill and had it presented in Congress (54th) by John Allen, of Mississippi, then Chairman of the Committee on Indian Affairs of the House of Representatives (H. R. 10372), authorizing the enrollment of Mississippi full-blood Choctaws and their children of mixed blood, not less than one-eighth Choctaw blood, that having been the rule laid down by the Choctaw statute of 1886. Upon this bill Robert L. Owen, in his professional capacity, appeared before the Committee of the House of Representatives and made an *argument* in favor of the Mississippi Choctaws, and the Committee made a *favorable* report declaring the full-blood Mississippi Choctaws entitled to citizenship in the Choctaw Nation west. R. 217.

During the same session of Congress the said Owen in his professional capacity *drew up a resolution* calling upon the Indian Office to advise the Senate as to the rights of the Mississippi Choctaws under treaty, and whether they had forfeited these rights by any treaty violations. R.

102, Finding XV. Said Owen *argued* the terms of this proposition before the Assistant Commissioner of Indian Affairs, the Hon. Thomas H. Smith, and furnished the material to enable a proper reply to be made to the Senate Resolution. A report was made giving the facts and setting forth that they had not by any treaty rights forfeited the rights granted by the Treaty of 1830. R. 102, 103.

To the Indian Appropriation Bill in February, 1897, Senator Walthall presented an amendment in language taken from House bill 10372, *prepared* by the said Owen, which resulted in a compromise item on the Appropriation bill in charge of Senator Pettigrew, at that time Chairman of the Committee on Indian Affairs of the Senate, in which the Dawes Commission were instructed to make a formal report to the Congress upon the rights of the Mississippi Choctaws. This Appropriations bill failed to become a law, but on June 7th, the following year, 1898, it was passed by Congress in the same identical form in which it was passed by the previous Congress and was approved by the President, so that this act instructing the Dawes Commission to make this report was directly the result of the professional services of Winton and his associates. R. 103, 218, 219.

A number of the full-blood Mississippi Choctaws lived in the Congressional District of Hon. J. S. Williams. He was originally of the opinion that they had no rights in the Choctaw Nation, and was confirmed in this opinion by the letters of the Commissioner of Indian Affairs of January and December, 1906. R. 101.

Robert L. Owen *presented argument* based upon the treaties in favor of the Choctaws to Mr. Williams and at *his request prepared a written brief* upon it, and convinced him that he was in error, and that the Mississippi

Choctaw Indians had legal rights that should be protected by the Government. R. 217: appendix to motion to remand, page ——.

In December, 1897, Robert L. Owen, in his professional capacity, assisted by Preston S. West, afterwards Assistant Attorney General of the Interior Department, *argued* the question of the rights of the Mississippi Choctaws before the Dawes Commission at Muskogee, resulting in a decision in the form of a report from the Dawes Commission, in which the Commission held that the Mississippi Choctaws under Article XIV were entitled to remove to the Choctaw Nation west and be admitted to citizenship, but that it would be necessary for them to be identified by some tribunal charged with that duty. R. 104.

In the spring of 1898 the Indian Committee of the House was presented a measure which ultimately became the so-called "Curtis Act" of June 28, 1898. Mr. Curtis, of Kansas, submitted a bill looking to the breaking up of tribal relations and then a second bill of like purport, and then a third bill, which finally became the Curtis Act. These bills were of intense interest to Indian Territory. As an amendment to the Curtis Act Senator Walthall in pursuance of the report of the Dawes Commission, presented the following amendment,

> "Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights to Choctaw lands, under Article 14 of the Treaty between the United States and the Choctaw Nation, concluded February 27, 1830, and to that end to administer oaths, examine witnesses and perform all other acts necessary thereto; and if they find such persons have removed to and in good faith become residents upon the lands in the Choctaw Nation and are entitled to enrollment under said article, they shall place their names on the rolls made by them."

directing the Dawes Commission to identify the Mississippi Choctaws and enroll those who were identified. The Committee on Indian Affairs adopted this amendment, but omitted the vital provision requiring the enrollment and allotment of the Choctaws so identified. The striking out of this vital provision was due to the hostility of the Choctaws and Chickasaws and their able counsel, who opposed the admission of the Mississippi Choctaws.

The Curtis Bill, contemplating the winding up of the affairs of the Five Tribes, and the enrollment of their citizens, expressly provided, *"that no persons shall be enrolled who have not heretofore moved to and in good faith settled in the State to which he claims citizenship."* This provision was sought by the representatives of the Five Tribes for the purpose of protecting themselves from the claims of non-resident Indians. It would have eliminated the Mississippi Choctaws had it passed unamended. In view of the *argument* made by Winton, and his associates the Committee inserted the following proviso:

> *"Provided, however,* That nothing contained in this Act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of the treaties with the United States." R. 105.

Except for this saving proviso the work done for the Mississippi Choctaws would have failed, and Winton and his associates were profoundly interested in it.

On July 1, 1898, Winton made a report to the Mississippi Choctaws in a printed form, and delivered it by runners to them as follows:

> NEWKIRK, O. T., July 1, 1898.
>
> *To the Mississippi Choctaws:*
>
> For your information I enclose report No. 3080,

H. R., 54th Congress, 2d session. The Indian Committee of House of Representatives decided favorably to the Mississippi Choctaws under date of March 3, 1897. This report was obtained for you by active labor, first hunting up the facts and then getting Senator Walthall to pass a resolution through the Senate to get the information (Sen. Doc. 129, 54th Cong., 2d sess.), and then soliciting Mr. Allen, of Mississippi, to prepare it. By the help of Mr. Williams and Senator Walthall and Mr. Allen the following item was put in the Indian appropriation act of June 7, 1897:

"That the commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws, under their treaties, are not entitled to all the rights of Choctaw citizenship, except an interest in the Choctaw annuities."

This commission, January 28, 1898, submitted their report, copy herewith (H. R. Doc. 274, 55th Cong., 2d sess.), deciding that the Mississippi Choctaws "to avail himself of the 'privileges of a Choctaw citizen,' *must prove himself a descendant of a fourteenth-article claimant, and in good faith join the Choctaws west with the intent to become one of the citizens of the nation.*"

In bill H. R. 8581 it was provided, June, 1898, that—

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation, concluded September 27, 1830, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto, and report to the Secretary of the Interior."

It provides further that—

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in

which he claims citizenship: *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States."

Not only the Dawes Commission found that the Mississippi Choctaws would have to move to Indian Territory and establish residence in good faith there, but the United States Court, Judge Clayton presiding, July 1, 1897, found that only those Choctaws who had previous to July 1, 1897, settled in good faith in the Choctaw Nation were entitled to citizenship.

By special authority of an item in the Indian appropriation bill allowing an appeal from this decision, I shall on your behalf make an appeal to the Supreme Court of the United States to test the question of your rights.

In making up the roll of Mississippi Choctaws it is of the highest importance to furnish proof that each claimant is a descendant of a fourteenth-article claimant. For this reason I have secured the list of such claimants, and will make it available to my clients as soon as practicable.

The Dawes Commission will probably take evidence this fall and enroll all who are truly entitled.

Yours, very respectfully,

C. F. WINTON,
Newkirk, O. T.

(R. 105.)

In this he reported the progress of his associates, and that they would be compelled to be identified before removing to the west and instructed them how to proceed. R. 105.

The Dawes Commission, represented by Hon. A. S. McKennon, identified the full-blood Mississippi Choctaws applying to him, and on March 10, 1899, he made a formal report of having identified 1,923 persons. R. 107, 108.

The Mississippi Choctaws were notified that the Dawes Commission was not authorized to enroll them for citizenship but merely to identify them. This scheduled identification was never approved by the Secretary of the Interior, but was formally disapproved *eight years afterwards,* on the 1st of March, 1897.

The schedule of identification proceeded on the theory of the so-called full-blood rule of evidence, that is to say, that the Article XIV claimants in the first instance having been Mississippi Choctaw full-bloods, or that their descendants who were full-blood Mississippi Choctaws must be Article XIV claimants, even if they had no record of descent from father to son. The Choctaws kept no record, and had no family names as a rule, and the individuals living in 1899 were unable to prove by competent technical evidence their descent from the individuals enrolled under the Treaty of 1830, as being Article XIV claimants.

In making this schedule of identification Mr. McKennon was furnished with a printed, alphabetical index, prepared by Robert L. Owen, containing 16,000 names of Mississippi Choctaws, which McKennon testified was of great service to him. R. 108.

This valuable rule of evidence was vital to the protection of the Mississippi Choctaws as a class and when this rule of identification had been adopted by the Dawes Commission in its formal report of March 10, 1899, it would have ended the controversy if it had been promptly approved by the Secretary of the Interior. The Choctaw Nation was represented in the controversy relating to the citizenship by the firm of McMurray, Mansfield & Cornish, who were employed on a contingent fee, which resulted in the allowance to them of 9 per cent basis of the value of the estates of those whose names they struck from the rolls, amounting to a very substantial fee.

The year following McKennon's report of March 10, 1899, he left the service of the Government and became associated with McMurray, Mansfield & Cornish, and soon thereafter the Dawes Commission reversed their position with regard to the full-blood rule of evidence, and upon an examination of the schedule made by the Dawes Commission in March, 1899, they found out of 6,000 Mississippi Choctaw applicants only one family, the family of Josephine Hussey, entitled to enrollment. R. 110, 220.

On April 4, 1900, Winton and his associates requested the following amendment to the Indian Appropriation Bill, then pending, "Provided that any Mississippi Choctaw duly identified and enrolled as such by the U. S. Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Mississippi Choctaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of *bona fide* settlement, they shall be enrolled by the Secretary of the Interior as Choctaws entitled to allotment." R. 109.

This amendment was offered on the floor of the Senate by James K. Jones, stating that he had done so at the instance of the attorneys of the Mississippi Choctaws, and it was adopted with the understanding that it might go to conference. *Congressional Record, April* ———, 1900, p. ———, Vol. ———. It went to conference and was adopted verbatim, except that the word "shall" was stricken out and the word "may" inserted before the words "be enrolled," and the Indian Appropriation Act of May 31, 1900, contains the following proviso:

> "Provided, that any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes, shall have the right, at any time prior to the approval of the final rolls of the Choc-

taw and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw and Chickasaw country, and on proof of the fact of *bona fide* settlement, may be enrolled by such U. S. Commission and by the Secretary of the Interior as Choctaws entitled to allotment." R. 109.

When Congress adopted the amendment prayed for in the memorials prepared by Winton and his associates, then on the solicitation of the attorneys of the Choctaws and Chickasaws, the Congress adopted a proviso declaring void contracts with the Mississippi Choctaws in the following language:

> "Provided further, that all contracts or agreements looking to the sale or encumbrance in any way of the lands to be allotted to said Mississippi Choctaws shall be null and void." R. 109.

Winton's clients thereupon executed new contracts to him, omitting all references to encumbering the land and providing that he should be paid a sum of money equal to a proportionate part of the estate recovered, contracts which were not obnoxious to the statute, and 2,000 Mississippi Choctaws signed such new contracts. R. 112.

The Court below in declaring the opinion (R. 174) that Winton and his associates were in no wise to be accredited with the passage of the Act of May 31, 1900, for which they had prayed in specific terms, was no doubt influenced by the testimony of Mr. Williams that he had drawn the proviso making void contracts and agreements which contemplated the encumbrance or sale of the land, but the Court evidently overlooked the fact that the Court itself had found as a fact that Winton and his associates had prayed for the very provision, recognizing the rights of the Mississippi Choctaws duly identified to make settlement

in the Choctaw-Chickasaw country, and be enrolled by the Dawes Commission which Congress passed. R. 109.

The Dawes Commission having reversed itself on the full-blood rule of evidence, thereupon proceeded to determine what Mississippi Choctaws were *duly identified,* and they interpreted the word "duly" to mean not Mississippi Choctaws identified on the schedule of March 10, 1899, or those entitled under "the full-blood rule of evidence," but only such Mississippi Choctaws as could furnish technically competent evidence that he or she was the direct lineal descendant of some Mississippi Choctaw duly enrolled as an Article XIV claimant under the Treaty of 1830.

This harsh interpretation resulted in a report of the Dawes Commission rejecting all the full-blood Mississippi Choctaws but six or seven. R. 110, 223.

This report was made May 24, 1902, and effectually nullified the obvious intention of Congress; discredited the instruction of the Secretary of the Interior of August 26, 1899, and of August 19, 1900. The Interior Department in the meantime, however, had been induced to alter its attitude toward the Mississippi Choctaws, so that the report of the Dawes Commission of May 24, 1902, would have completely eliminated the Mississippi Choctaws from any possible participation in the Choctaw estate west.

This report of the Dawes Commission was made in pursuance of this changed attitude of the Secretary of the Interior, and in disregard of the opinion of Attorney General Van Devanter of December 3, 1901, he having held therein that the full-blood rule of evidence was binding. R. 221, 222.

On February 7, 1901, an agreement between the Dawes Commission and the representative of the Choctaw-Chickasaws was submitted to the Interior Department, in which

the rights of the full-blood Choctaws were recognized in pursuance of the *prayers and arguments* theretofore submitted by Winton and his associates, as hereinbefore referred to, in the following language:

> "All persons hereafter identified by the Commission and the Five Tribes as Mississippi Choctaws, and whose names appear upon the schedule dated March 10, 1899, prepared by the said Commission, under the Acts of Congress approved June 28, 1898, and such full-blood Choctaw Indians residing in the State of Mississippi, and such full-blood Choctaw Indians as have removed from the State of Mississippi to the Indian Territory as may be identified by said Commission, shall alone constitute the Mississippi Choctaws entitled to benefits under its agreement." R. 110.

In the Department of the Interior, without consultation with the Mississippi Choctaws, or their attorneys, this language protecting the Mississippi Choctaws, was struck out and changed so as to read as follows:

> "All persons *duly identified* as Mississippi Choctaws by the Commissions of the Five Civilized Tribes under the Act of Congress, may at any time prior to September 1, 1901, make *bona fide* settlement within the Choctaw-Chickasaw country and upon proof of such settlement on or before September 1, 1901, may be enrolled by such Commission as Mississippi Choctaws, entitled to allotment which enrollment shall be final when approved by the Secretary of the Interior." R. 111.

The effect of this amendment was to strike out the recognition of the McKennon roll of March 10, 1899, and to eliminate the full-blood rule of evidence (because the Dawes'

Commission had already so construed the words "DULY IDENTIFIED" in the Act of 1900), and *would have barred from enrollment every Mississippi Choctaw* excepting six or seven, and even these six or seven under penalty of forfeiture would have been compelled within a few months to have moved and made proof of settlement, a thing impossible for people hired out under contract in Mississippi where the laws forbade an agricultural employee from removing during the crop season.

The change by the Dawes Commission and the Choctaw and Chickasaw representatives of the agreement recognizing the Mississippi Choctaws to the formal agreement which had already been interpreted adversely by them in many hundreds of cases, all shows the dangerous character of opposition which the attorneys of the Mississippi Choctaws had to meet at the hands of certain officials of the Interior Department and of the representatives of the Choctaws and Chickasaws.

(Counsel is compelled to point out this almost occult opposition, otherwise they could not hope that it would be clearly understood or the value of the services of Winton and his associates adequately recognized.)

On March 21, 1902, the representatives of the Choctaws and Chickasaws and the Dawes Commission brought in another agreement in which appears the following:

> "41. All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stats., 495), as Mississippi Choctaws entitled to benefits under Article 14 of the treaty between the United States and the Choctaw Nation, concluded September 27, 1830, may, at any time within six months after the date of the final ratification of this agreement, make *bona fide* settlement within the Choctaw-Chickasaw country, and upon proof of such

settlement to such commission within one year after the date of the final ratification of this agreement may be enrolled by such commission as Mississippi Choctaws entitled to allotment as herein provided for citizens of the tribes, subject to the special provisions, herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said commission after the date of the final ratification of this agreement." R. 112.

The objection of Winton and his associates to this proposal was that the term *"duly identified"* had already been construed by the Dawes Commission in a report which they were on the point, at that time, of delivering to the Interior Department, and which they did deliver on May 24th immediately thereafter, in which they interpreted *"duly identified"* to mean the contrary of the full-blood rule of evidence, and which language *"duly identified"* they so interpreted as to exclude every one of the full-blood Mississippi Choctaws excepting Josephine Hussey and her family, consisting of six or seven persons. R. 110.

This language was sinister and dangerous in the highest degree to the Mississippi Choctaws and made necessary the memorial to the Senate and House of Representatives by Winton and his associates of April 24, 1902 (R. 112), which was printed as a Senate Document, and is set out in full in the appendix filed with appellants' motion to remand this case to the Court below for additional findings. Appendix, page ———

In this memorial Winton and his associates prayed that the onerous conditions of Sections 41-44 should be struck out and a provision inserted recognizing the schedule of March 10, 1899, recognizing such full-blood Choctaw Indians as might be identified by said commission, together

with their wives, children and grandchildren, and that they might be allowed to remove subject to reasonable requirements of proof less exacting than the language submitted by the Choctaw-Chickasaw attorneys and the Dawes Commission.

Winton and his associates by said memorial prayed for the recognition of the full-blood Choctaws and their children and grandchildren. The Act of Congress was amended to establish the full-blood rule of evidence and enroll the full-blood Choctaws, but the statute was so rigorously interpreted afterwards by the Dawes Commission that it did not recognize the mixed-blood children of the Mississippi full-blood Choctaws so enrolled showing clearly and completely there was no disposition on the part of the Government officials to recognize the Mississippi Choctaws any further than they were compelled to do by statute.

An appeal had been made to Assistant Attorney General Van Devanter on behalf of the Mississippi Choctaws, and on December 3, 1901, he delivered an opinion on the construction of the Act of May 31, 1900, which had provided that the Mississippi Choctaws duly identified might be enrolled for allotment upon removal west. The Dawes Commission had construed the words "duly identified" to mean that they should be identified upon competent evidence, showing that the claimants were of lineal descent or duly enrolled as a 14th Article claimant under the Treaty of 1830. They required strict technical proof which was impossible for the ignorant Mississippi Choctaws. They had interpreted the Act of May 31, 1900, to mean the elimination of the full-blood rule of evidence laid down by the Dawes Commission in the report of March 10, 1899. Assistant Attorney General Van Devanter held that the action of the Dawes Commission, an authorized tribunal, to pass upon the question, in declaring the full-blood rule of evidence,

and the action of the Interior Department in accepting that report as correct, as an authorized construction which the Dawes Commission could not properly disregard.

Unfortunately for the Mississippi Choctaws, the opinion of Attorney General Van Devanter was ignored by the Dawes Commission and on May 24, 1902, they brought in a report disregarding the full-blood rule of evidence, interpreting the Act of May 31, 1900, so rigorously and technically that they found only one family of Josephine Hussey entitled, out of all the claimants for rights as full-blood Mississippi Choctaws. R. 110.

Upon the urgent appeal of Winton and his associates to the Congress through printed memorials (R. 112), Senate Document 319, 57th Congress, 1st Session, appendix to appellants' motion to remand, page....., urging the establishment of the full-blood rule of evidence, and proper professional *argument* made before the committees of Congress, a compromise was arrived at in the Committee of Indian Affairs of the House of Representatives, in which the Chairman of the Committee advised the attorneys of the Choctaws and Chickasaws, J. F. McMurray, that he must prepare an amendment recognizing the full-blood rule of evidence. This draft was made by Mr. McMurray and submitted to Attorney General Van Devanter, who approved it, and it was accepted by all parties and presented on the floor of the House as a committee amendment, as a means of terminating the long-conducted controversy with regard to the rights of these people, a controversy waged exclusively in their behalf by Winton and his associates. R. 225-226.

There can be no doubt whatever that this compromise was effected by the services, assiduity, diligence and professional services of Winton and his associates. The fact that it was a compromise for the purpose of settling this

controversy is evidenced by numerous statements in the record. R. 225, 226.

The Court below interpreted the opposition of Winton and his associates to the Choctaw-Chickasaw agreements of 1901 and 1902 in the form in which they were submitted, to wit, using the term "duly identified" as being in opposition to the beneficent plans of the Government to give the Mississippi Choctaws their rights. This interpretation is impossible for the reason that Winton and his associates had no object in the world except to enroll the full-blood Mississippi Choctaws for whom they had been contending for six years, and their opposition was not to the Choctaw-Chickasaw agreements, but to the passage of those agreements without *"proper amendment"* as alleged in appellants' second amended petition (R. 26), and in a form which would have excluded the full-blood Mississippi Choctaws.

Winton's memorials, prepared with great professional skill, *and printed as Senate documents*, show in the clearest possible manner what that contention was, that is, that the Choctaw-Chickasaw agreement should be passed in a form unequivocal in terms that would by statute recognize the full-blood rule of evidence which they had secured in the report of March 10, 1899.

Winton and his associates desired that the condition imposed upon the Mississippi Choctaws should not be impossible of fulfillment, that is to say, that the requirement of the agreements submitted in 1901 that the Mississippi Choctaws should remove to the Choctaw country west before the 1st of September, 1901, was an impossible requirement, because the Mississippi Choctaws were farm laborers in Mississippi and therefore subject to the Mississippi statutes that anyone aiding or abetting laborers to move during the crop season would be subject to criminal

proceedings. This was well known to the Choctaw Nation authorities, and the agreement of 1901 while apparently recognizing the rights of the Mississippi Choctaws was so drawn as to exclude them by using the term *"duly identified"* already interpreted against them by the Dawes Commission in many cases which had been submitted with individual reports to the Interior Department.

The conditions imposed by the Choctaw-Chickasaw attorneys in the agreement of 1902, were of like character, that is, that they must be *"duly identified"* which they well knew the Mississippi Choctaws could not comply with under the interpretation of that language already given it by the Dawes Commission and under the other requirements that they should be required to remove within six months after the passage of the agreement *and before they were authoritatively identified*, when the Indian Office had advised Representative Williams that Mississippi Choctaws moving to the Choctaw country west before identification were liable to arrest and ejection as intruders. The Mississippi Choctaws had no money and were compelled to rely upon somebody to furnish them the means of transportation, and nobody could do this before they were identified for enrollment.

The objections made to the agreement of 1902 by Winton and his associates were reasonable and just and strictly within professional propriety and Congress recognized the justness of the contention of Winton and his associates by amending the Choctaw-Chickasaw agreement, submitted to Congress by the Secretary of the Interior, (1) by inserting the full-blood rule of evidence, and (2) by giving the Mississippi Choctaws reasonable time after identification within which to remove, and (3) gave them abundant time in which to be identified.

The claim of citizenship in the Choctaw Nation aroused a great feeling of resentment in the Choctaw-Chickasaw Nation, and in the Interior Department, because the number of applicants rose to gigantic proportions, coming from various States of the Union, offering perjured testimony and there were over 25,000 applications made under the head of Mississippi Choctaws.

But, most urgently and most respectfully we invite the attention of the Court to the fact that Winton and his associates from the beginning in the Jack Amos case and in their memorials from 1896 down to 1906, *made their appeal for the full-blood Mississippi Choctaws alone.* **Every Memorial shows this.** And only the full-blood Choctaws were finally admitted.

The value of the services of Winton and his associates is further demonstrated convincingly by the fact that subsequent to 1906 the full-blood Choctaws remaining in Mississippi, represented by their counsel and for whose rights the Hon. John Sharp Williams has strenuously struggled for a period of ten years, not one single claimant has been admitted and no legislation from Congress has been possible as referred to in the opinion of the Court below.

Under the agreements of the Choctaw-Chickasaws in 1902, amended at the instance and upon the *argument* and by the prayers of Winton and his associates, *made in the form of a written memorial* to the Senate and the House of Representatives, which was so far dignified by the Congress that it was printed as a U. S. Senate document for the permanent records of the Government, to wit, Senate Document 319, 57th Congress, 1st Session, there were enrolled altogether 1,643 Mississippi Choctaws.

The Record shows that Winton and his associates appealed in vain to the Dawes Commission and to the Interior

Department for agreement on the Act of 1902 that would permit the children of full-bloods who might themselves be of mixed blood to be enrolled, and it was refused both by the Dawes Commission and by the Interior Department by a technical and rigid construction of the compromise agreement of 1902.

The fact that it was a compromise agreement was brought out in the public records by the attorneys of the Choctaws and Chickasaws and by the Choctaw Chief, and their representatives, before the committees of the Senate in urging upon the Senate that the Choctaw rolls should not be opened to the admission of any other Mississippi Choctaws.

In 1906 in order to safeguard the Mississippi Choctaws from further technical constructions of the compromise agreement of 1902, Winton and his associates presented a printed memorial to the Congress of the United States, which was printed as a Senate document,.....Congress .....Session ..... in which it was prayed that Mississippi Choctaws, duly identified as such should stand upon the same basis as other Choctaw citizens. Congress adopted their prayer in the following terms:

> "SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March 4, 1906, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee or Creek Tribes or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled.
>
> "SEC. 21.
>
> * * * * * * *
>
> "That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settle-

ment in the Choctaw country and within the period prescribed by law for making such proof may, within sixty days from the passage of this act, appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed." (34 Stat., 137, 145.)

This ended the professional services of Winton and his associates to the Mississippi Choctaws. It was a long and arduously fought contest beginning with the presentation of Jack Amos' case before the Dawes Commission in 1896 at Vinita, Okla., appealed that case to the U. S. District Court, and appealed it to this Court, presenting memorials, professionally drawn, giving the legal reasons why the full-blood Mississippi Choctaws were entitled to be enrolled for allotment in the lands west. These *printed memorials to Congress and these professional arguments* made in the only way available for professional men, and by *hearings before committees* were persisted in for a period of ten years at a very great cost to the attorneys representing these interests. And, when the services had been honorably ended, the committees of the two Houses, perfectly familiar with the services rendered, every one of the active members of these committees having testified to these services, Congress passed a jurisdictional act directing the Court of Claims to consider and adjudicate the claim for services of Winton and his associates, and to render judgment *quantum meruit* as might appear equitable or justly due. The services rendered by Winton and his associates were not to an individual as such but to all the Mississippi Choctaws from beginning to the end of the service. R. 96, 97, 229, 230.

Winton and his associates could not represent the in-

terests of the Mississippi Choctaws as a class, except through the authority of individuals who as Mississippi Choctaws were entitled to and who were authorized in their own interests to seek legislative action for the protection of the class to which they belonged, and Winton confessedly was authorized by over 2,000 individuals, a larger number than were actually enrolled. R. 112.

Nowhere does there appear the slightest evidence of unprofessional conduct. No charge is made in the record of unprofessional conduct, and no fact is found of unprofessional conduct. There is nothing in the record or findings of fact to justify a reference to the *Trist* case.

ASSIGNMENT OF ERRORS

Appellants hereby assign the following errors in the judgment of the Court of Claims:

1. Said Court held and decided that the appellants were not entitled to compensation for the services rendered the Mississippi Choctaws as set out in findings 9 to 32 inclusive, R. 100-116, and as set out in findings 43 and 46, R. 130-132.

2. Said Court held and decided that findings of fact on certain special questions of fact previously requested to be found by plaintiff below, were incompetent or immaterial to the issues involved. The rulings here referred to have reference to the subject matter partly covered by requests for findings 9, 10, 11, 12, 16, 18, 19, 20, 23, 24, 29, 31 and 32, as shown on pp. 213 to 231 of the record and as there shown the Court refused to make findings of any kind whatever thereon.

3. Said Court held and decided that the services rendered the Mississippi Choctaws as set out in findings 9 to 32 inclusive, R. 213-231, were such as to bring them within

the ruling of this Court in the case of *Trist vs. Child, 21 Wall, 450*, and therefore the appellants below were not entitled to compensation therefor.

4. The said Court held and decided that the plaintiffs below had not represented before Congress, its committees and the Government departments the Mississippi Choctaws as a class and that having contracts with a part of the class, they were without authority to represent all of the class—the Mississippi Choctaws enrolled and allotted.

5. That said Court held and decided that the United States as trustee for the Mississippi Choctaw Indians could not be made a party defendant.

6. That said Court held and decided to overrule plaintiffs' motion of February 6, 1917, to have embodied in the transcript of the record for this Court the claimants motion filed August 9, 1915, to amend the findings of fact made by the Court on May 17, 1915, which said motion covered the same subject matter of facts set out in claimants' "request for findings of facts on certain questions of fact" filed January 8, 1917, and held that the facts therein requested were immaterial or incompetent as stated in the Court's opinion of January 29, 1917. R. 201, 213, 232.

ARGUMENT

JURISDICTION

The Court below rightly held that it had jurisdiction of the present case under the jurisdictional acts. The jurisdiction of the Court below, however, was challenged by the defendants on several grounds. The first was "that the jurisdiction of the Court of Claims does not extend to private controversy between citizens of the United States." Such contention is entirely foreign to the subject of the

jurisdictional acts. Answer, however, to that contention is found in the case of the *United States vs. The Union Pacific R. R. Co.,* 98 U. S., 569, wherein the Court says:

> "The Constitution declares, Article III, Section I, that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; and to controversies to which the United States shall be a party.
>
> "The matters in regard to which this statute authorizes a suit to be brought are very largely matters arising under the law of the United States which chartered the Union Pacific Railroad Company, and conferred on it certain rights and benefits, and imposed on it certain obligations. It is in reference to these rights and these obligations that the suit is to be brought. It is also to be brought by the United States, which is, therefore, necessarily a party and the party plaintiff. Whether, therefore, the suit which has been brought is one authorized by the statute or not, it is very clear that the general subject on which Congress legislated is within the judicial power of the Government, as defined by the Constitution. * * * The discretion, therefore, of Congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the Supreme Court. " * * * *We say, therefore, that, with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power vested in the United States, is unlimited by the Constitution.*
>
> "Congress has, under this authority, created several classes of courts. It has established by statute the district courts, the circuit courts and the *Court of Claims,* and has conferred on each of these a defined portion of the judicial power found in the Con-

stitution, and has regulated by similar statutes the appellate jurisdiction of the Supreme Court."

A constitutional question raised in the Court below was that if judgment should be rendered in that Court against the defendant Indians it would be "the taking of property without due process of law." The due process of law in the present case is the Jurisdictional Act and as long as the defendant Indians are wards of the Nation, that law is sufficient to comply with all of the provisions of the Constitution.

In the Court below an effort was made by the defendants to discuss the "pertinent provisions of the law of the land in Oklahoma," but no reference whatever was made to the provisions of the Enabling Act under which the State of Oklahoma was admitted into the Union, which reserved to Congress the guardianship over the Indians. That Enabling Act is "the law of the land" so far as the Indian wards of the Nation in Oklahoma are concerned and it limited the people of Oklahoma to the framing of a constitution which would not, in any way, "impair the rights of person or property" of the Indian wards of the Nation, and specially reserved "the *authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or their rights by treaties, agreement, law or otherwise which it would have been competent to make if this Act had never been passed.*" Thus it will be seen that the Mississippi Choctaws occupied an entirely different status than that occupied by a citizen not an Indian over whom Congress exercises no guardianship.

It was strongly contended in the Court below by the defendants that "contracts for securing legislation are invalid." Winton and associates did not sue upon the con-

tracts and the contracts were only introduced as evidence.

A case in which the facts are somewhat similar to the facts in the present case is that of *Butler & Vale vs. the Colville Indians,* 43 C. Cls., 497. The judgment in that case was indirectly affirmed by this Court in *Gordon's case,* 226 U. S., 221. In the Colville Indian case, Maish & Gordon had contracts with the Indians for representing them before Congress and its Committees and they employed Butler & Vale to assist in the work. The work covered by their contract, however, was not accomplished within the life of the contract and it became void by its own terms. Butler & Vale, however, *without authority* took up the work at the next Congress and accomplished it would seem from the findings of the Court of Claims the legislation desired, that is, certain legislation was enacted in behalf of the Colville Indians. In the present case Winton and associates had contracts with the Mississippi Choctaw Indians and Congress passed legislation making these contracts null and void as incumbrances on the Indian lands, but also enacted legislation giving the Court of Claims jurisdiction to determine what services Winton and associates rendered the Mississippi Choctaws, the value thereof and to render judgment accordingly, the same kind of jurisdictional legislation as Congress enacted in the Colville Indian case. Comparing the facts in the Colville Indian case with the facts in the present case we find almost the same state of facts.

In the Colville case, according to findings 4 and 5, p. 505, Levi Maish and Hugh H. Gordon, after the execution of the Maish-Gordon contract with the Indians, *"began to confer with leading members of Congress, and furnished them with facts and decisions of the courts in relation to the matter."*

In the very beginning of this *"long and somewhat furious*

contest," as styled by the Court below, Owen instituted the Jack Amos case to test the rights of the Mississippi Choctaws under the Act of 1896 and the Treaty of 1830, and immediately thereafter was *the first man to present the matter by argument, oral and written,* to Mr. Williams, a Member of Congress from Mississippi, and to the committees of Congress both of the House and the Senate.

Finding 7 of the Colville Indian case, p. 506, describes the services rendered by Daniel B. Henderson, which, according to that finding, in short, consisted in the preparation of a bill to be introduced in Congress, and a correspondence which he had with the agent of the Colville Indians, and, being instrumental in bringing a delegation of Indians to Washington—with the result that he through them learned a great deal about the history of their claim.

Mr. Owen, at that time, 1896, was most probably the best informed attorney in this country as to Indian legislation, and particularly as to the rights of the Mississippi Choctaws, and the history of those rights under the Treaty of 1830, and Mr. Winton's trips to Mississippi among the Mississippi Choctaws enabled him to learn through them a great deal about the history of the Indians, their way of living, their financial and social status and the history of their claim.

The last paragraph of finding 7, p. 506, states that it appears that the efforts of the attorneys for the Colville Indians were directed up to the year 1905 to secure an act authorizing the Court of Claims, to adjudicate the claims, after which they endeavored to secure a direct appropriation for the Indians.

In the present case the effort of Owen and Winton, the attorneys for the Mississippi Choctaws, from 1896 to 1900, were directed to secure an act authorizing the adjudication

of the rights of the Mississippi Choctaws, by the Court of Claims, or those rights recognized direct by Congress, without requiring the Indians to move to the Indian Territory. Afterwards, or early in the year 1900, the efforts of Owen and Winton, the attorneys for the Mississippi Choctaws, were directed to obtain recognition at the hands of Congress of the rights of the Mississippi Choctaws, requiring removal to the Indian Territory, and in this way obtain authority at the hands of Congress for the Mississippi Choctaws sharing equally with other Choctaws in the property and funds of the Choctaw Nation.

Finding 8, p. 507, of Colville Indian case, refers to the work done by Frederick C. Robinson, and states that he first became interested in the Colville case in 1904 and in the early part of 1906 made a trip to Washington and paid the expenses of Hugh Gordon's coming to Washington, and there for the first time met Butler and Vale and discussed the case with them and with them undertook to map out such line of action as would conduce to establishing the rights of the Indians, and that he prepared a brief on the subject and *saw the members of the Conference Committee* and laid before them his views on the rights of said Indians, and that he supplied Marion Butler from time to time with facts upon the matter.

Finding 13 of the Colville Indian case, page 510, states that Marion Butler first came into the case as a result of his employment by Henderson, Maish and Gordon, about 1903, and at once proceeded to prepare a bill for the relief of said Indians, which was introduced in the Senate in a modified form. Mr. Butler prepared a brief on the question of the Indians' title, which was presented to the committee, but no action was taken at that session of Congress. In 1904 another bill substantially the same was introduced in the Senate, and Mr. Butler appeared before the Com-

mittee and made arguments on the question of title, but failed to get a favorable report.

The record in the present case shows very clearly that Owen, Winton and associates *prepared numerous bills and had various hearings*, and obtained some *favorable reports* in behalf of recognizing of the rights of the Mississippi Choctaws. In this way their efforts were more favorably recognized at the hands of the committees than were the efforts of Butler and attorneys for the Colville Indians, for they failed to secure favorable reports.

Up to 1904 all of the services rendered by Butler and Vale and associates in behalf of the Colville Indians was under the Maish-Gordon contract, *which expired that year*. After the expiration of the Maish-Gordon contract, Mr. Butler, *without any authority whatever*, appeared before the committee and stated that he wished to continue the prosecution of the claim on a *quantum meruit*, and made an argument on the question as to whether the decision in the Lone Wolf case was applicable to the Colville claim, but no action was taken at that session of Congress.

In the 58th Congress, 1905, Mr. Butler caused to be introduced in the Senate a bill for the relief of the Indians, providing for the recognition of their rights, and setting aside to their credit in the United States Treasury, the sum of $1,500,000. This bill or provision was introduced in the form of a proposed amendment to the Indian Appropriation Bill, and Butler appeared before the sub-committee in support of said amendment and made arguments in support thereof. Said amendment, slightly modified, was placed upon the Appropriation Bill, and passed the Senate, but the House of Representatives failed to concur. Practically the same work with the same result was had at the next session of Congress, *and it was left to the conference*

committee which considered it and reported the amendment, and it became a law.

Winton and Owen, in the beginning, had contracts with many Mississippi Choctaws to represent them before the authorities of the Choctaw Nation, Government officials and Congress and its committees in the matter of their claim to citizenship in the Choctaw Nation. In 1900 Congress, by the act of May 31, 1900, annulled those contracts, but, notwithstanding this fact they, like Butler in the Colville Indian case, continued to labor in behalf of the Mississippi Choctaws, preparing bills and having them introduced in both Houses, *presenting oral and written arguments* to the committees in behalf of the Mississippi Choctaws.

The Winton-Owen Memorial of April 24, 1902, petitioned Congress for an amendment giving the Mississippi Choctaws time to remove after their identification and also to permit application for recognition and enrollment of Mississippi Choctaws, the same as that granted to any other Choctaw.

In the Colville Indian case efforts to obtain legislative relief for the Colville Indians met with adverse reports in the beginning, as did the efforts in the present case, to obtain legislative relief for the Mississippi Choctaws, in the beginning. Nothing was accomplished for the Colville Indians during the life of the Maish-Gordon contract, and after its expiration when Butler or anyone else for or with him, appeared before the committees of Congress in behalf of the Colville Indians, they did so by permission, consent or acquiescence on the part of the committee or the members of said committee representing Congress. When Owen and associates appeared before the Committees of Congress, urging legislative relief for the Mississippi Choctaws, especially after the attempt on the part of Congress in 1900 to annul the contracts with the Indians, they did

so with the permission, acquiescence and consent of the respective committees, and the members thereof representing the Congress, just as did Butler and Vale in the Colville Indian case.

In the same act which granted to the Colville Indians the legislative relief sought for by Butler and Vale, Congress gave the Court of Claims jurisdiction to ascertain and determine, what compensation the Indians should pay them, their attorneys, for said services, with authority to render judgment therefor.

Owen and Winton, even after the passage of the Act of July 1, 1902, continued their labor in behalf of the Mississippi Choctaws, and the Act of Congress containing a recognition of the rights of the Mississippi Choctaws, set out in finding thirty-one, further than that provided for in the Act of July 1, 1902, also contained a provision giving the Court of Claims jurisdiction to hear, consider and adjudicate the claims against the Mississippi Choctaws of the estate of Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claim of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of *quantum meruit* in such amount or amounts as may appear equitably or justly due therefor, the same as did Congress in the Colville Indian case. It would, therefore, seem that the two cases are in almost all, if not all, respects, similar. If there is any difference, that difference is in favor of Owen and Winton, in this, that the facts in the Colville Indian case show that subsequent to May, 1904, the services rendered by Butler, Vale and associates were voluntary and without authority, while in the present case Owen and Winton had the authority of a majority of the Mississippi Choctaws to represent them.

In the present case it is shown that the Mississippi Choctaws were informed by Winton's circular letter addressed and sent to them, advising them of the action which was being taken in Congress in their behalf. R. 106.

In the Colville Indian case the findings of fact do not show that the Indians had any knowledge whatever of the services rendered by Butler, Vale and associates, after the expiration of the Maish-Gordon contract in May, 1904.

In the Colville Indian case it is stated on page 525 that Butler, Vale and associates in their efforts to secure legislative relief for the Colville Indians, had *"the valuable assistance of the Department of the Interior."* In the present case the attorneys for the Mississippi Choctaws did not have the valuable assistance of the Department of the Interior, but on the contrary, *had to overcome the opposition of the Department of the Interior*, the opposition of the Dawes Commission and the opposition of the representatives of the Choctaw Nation. R. 160-161.

In the case of *Bailey vs. the Osage Indians and the United States*, 43 C. Cls., 353, the Court entered a judgment in favor of the plaintiff for compensation for services rendered the Indians in a sum which the Court deemed to be *"fair and reasonable"* as required by the jurisdictional act, plaintiffs' contract with the Indians not having received the official sanction of the Secretary of the Interior as provided by section 2103, Revised Statutes was *ultra vires*, and was only used by the Court as evidence. 43 C. Cls., 353, 357-8.

In the case of *Crocker vs. U. S.*, 49 C. Cls., 85, an action upon an express contract, judgment was rendered by the Court of Claims against the Government as of a *quantum meruit* and that Court said:

"The result, therefore, is that the plaintiff company

did not perform its contract, but committed a breach thereof, which is not cured by its offer to make restitution after the fact. The company never did at any time furnish more than the body of the satchels. This suit, it is true, is predicated upon the written contract. The allegations of the petition are confined strictly to such a cause of action; nevertheless, we believe it is within the province of the Court to award judgment as upon *quantum meruit*. *Clark vs. United States*, 95 U. S. 539; *Wardell vs. United States*, 103 U. S., 651; *Thomas vs. Brownville, etc., R. R. Co.*, 109 U. S., 522. Defendants practically concede this authority, but contest the sufficiency of proof to sustain the value of the goods furnished."

The above case was affirmed by this Court, 240 U. S., 74.

The defendants below contended that "the Mississippi Choctaws were released from the guardianship of the United States by the Treaty of September 27, 1830."

The said treaty of September 27, 1830, does not by inference or otherwise release the Mississippi Choctaws from the guardianship of the Government. The construction of said treaty most favorable to that contention is that the Choctaws remaining in Mississippi might become citizens of the States, but under this most favorable construction such Choctaws would "*not lose the privilege of a Choctaw citizen*" and therefore remained wards of the Nation in accordance with the terms of the 14th article of said treaty.

Citizenship, however, in a State, or national citizenship is not incompatible nor inconsistent with Government control or Government guardianship of the Indian. *United States vs. Logan*, 105 Fed. 240; *United States vs. Mullin*, 71 Fed. 682; *Rainbow vs. Young*, 88 C. C. A. 653, 161 Fed. 836; *United States vs. Rickert*, 188 U. S. 432; *McKay vs. Kalyton*, 204 U. S. 458; *Beck vs. Flourney Live Stock and Real Estate Co.*, 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30;

Farrell vs. United States, 49 C. C. A. 183, 110 Fed. 942; *Re Coombs*, 127 Mass. 278; *State ex rel. Tompton vs. Denoyer*, 6 N. D. 586, 72 N. W. 1014; *State vs. George*, 39 Or. 127, 65 Pac. 604.

This Court considered this question in the case of the *United States vs. Celestine*, 215 U. S. 195, wherein the Court speaking through Mr. Justice Brewer said:

> "Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race; at any rate, it cannot be said to be clear that Congress intended, by the mere grant of citizenship, to renounce its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal of the State; no grant to him of the benefit of those laws; no denial of the *personal jurisdiction* of the United States."

According to the above words of this Court as spoken by Mr. Justice Brewer, the gift of citizenship to an Indian is not *"a subjection of the individual Indian to the laws, both civil and criminal, of the State;"* and the gift of citizenship is *"no grant to him of the benefit of those laws,"* and it is *"no denial of the personal jurisdiction of the United States,"* therefore, the contention that the Court of Claims was without jurisdiction by reason of that provision of the Constitution which declares that no person shall be deprived of life, liberty or property without due process of law is not tenable.

It is settled beyond question that the Government of the United States is the guardian of the Indians, and that that guardianship can only be released by Congress. The Mississippi Choctaws by race were naturally the wards of the Nation, and at various times Congress has exercised that

guardianship by enacting legislation pertaining to them until finally the act of May 31, 1900, and the Choctaw-Chickasaw agreement of July 1, 1902, became laws, as a result of which legislation they became *legally recognized* citizens of the Choctaw Nation, and certainly from that time to the present they have been under the direct guardianship of the Government, and no law can be found releasing them from that guardianship.

In the case of *Tiger vs. The Western Investment Co.*, 221 U. S., 286, this Court reviews previous decisions relative to the power of Congress over the person and property of individual Indians. Marchie Tiger was one of those Indians who became a citizen of the United States under the act of March 3, 1901, 31 Stat., 1447, and the Court's opinion in the Tiger case clearly holds that the Indian is still the ward of the Nation notwithstanding the fact that he had become a citizen of the United States. In the Tiger case the Court said.

> " 'The power of the general Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else: because the theater of its exercise is within the geographical limits of the United States; because it has never been denied: and because it alone can enforce its laws of all the tribes.' United States *vs. Kagama*, 118 U. S., 375, 30 L. Ed., 228, 6 Sup. Ct. Rep., 1109.
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> "Citizenship, it is contended, was conferred upon the Creek Indians by the act of March 3, 1901 (31 Stat. at L. 1447), amending the act of February 8, 1887 (24 Stat. at L. 390), by adding to the Indians given citizenship under that act, 'every Indian in the Indian territory.' So amended the act would read as

to such Indian: 'He is hereby declared to be a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizen.' Is there anything incompatible with such citizenship in the continued control of Congress over the lands of the Indians? Does the fact of citizenship necessarily end the duty or power of Congress to act in the Indian's behalf?

"Certain aspects of the question have already been settled by the decisions of this Court. That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed. Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, 308.

"Nor has citizenship prevented the Congress of the United States from continuing to deal with the tribal lands of the Indians.

* * * * * * *

"Taking these decisions together it may be taken as the settled doctrine of this Court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body and not the courts, to determine when the true interests of the Indians require his release from such condition of tutelage.

"The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their person and property. The privileges and immunities of citizenship were said, in the Slaughter House Cases, 16 Wall., 36, 76, 21 L. Ed., 394, 408, to comprehend:

" 'Protection by the Government, with the right to acquire * * * and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraint, as the Govern-

ment may prescribe for the general good of the whole.'

"Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation."

In the case of *Heckman vs. United States,* 224 U. S., 413, the Court says:

"It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. Shields *vs.* Barrow, 17 How., 130, 139, 15 L. Ed., 158, 160; Williams *vs.* Bankhead, 19 Wall., 563, 22 L. Ed., 184.

"The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care,

and it recognizes no limitations that are inconsistent with the discharge of the national duty."

The Mississippi Choctaws, as well as all full-blood Indians living in Indian Territory, now Oklahoma, are not only citizens of the United States, *but are also wards of the Nation,* as was decided by the Court in the Marchie Tiger case. The Mississippi Choctaws have not been released from the Nation's guardianship and still being wards of the Nation, Congress, believing that some service had been rendered to these wards, passed the jurisdictional act authorizing suit to be brought in the Court of Claims. When Congress clothed the Court of Claims with jurisdiction to hear, consider and adjudicate the claims against the Mississippi Choctaws, a due process of law was provided, the same due process of law exactly as Congress provided under which the Court of Claims entered a judgment against the Eastern Cherokees fixing the attorneys' fees. 45 C. Cls. 104.

It is true the Eastern Cherokee case is a branch of the case of the *Cherokee Nation vs. The United States,* 40 C. Cls. 252, but the moment that the Court decreed that the Eastern Cherokees were entitled to a certain fund or sum of money, that sum of money became the property of the Eastern Cherokees, and when the Court in a later proceeding entered a judgment in favor of the attorneys for the Eastern Cherokees for a sum equal to fifteen per cent (amounting to $740,555.41) of the sum or fund decreed to the Eastern Cherokees, it was taking property from the Eastern Cherokees just as property would be taken from the Mississippi Choctaws in the event the Court of Claims should in the present case render judgment against them.

By the act approved April 26, 1906, 34 Stat. at L., 144, Sec. 19, it is provided:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress."

The property of the Choctaw Nation is exclusively under the control of Congress and it is for Congress alone to designate the forum in which claims against the Indian allottees for services rendered in connection with their allotments and individual shares in the tribal property are to be determined, *Southern Kansas Railway Co. vs. Briscoe,* 144 U. S., 133-135.

Congress in the proper discharge of its fiduciary obligations to its wards, the 1,643 Mississippi Choctaw Indians, possesses plenary power over all tribal property, both lands and moneys, and over all lands allotted in severalty to individual Indians, the sale, alienation or incumbrance of which, by the allottee is prohibited by law, notwithstanding citizenship, both State and Federal, has been conferred upon them, and the Government now holds their funds in trust for them.

In *Goat vs. United States,* 224 U. S., this Court, at page 316, says:

"Upon the matter involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; *that there is nothing in citizenship incompatible with this guardianship* over the Indian's lands inherited from allottees as shown in this case; that in the present case when the Act of 1906 was passed, the Congress had not released its control over

the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; *that it rests with Congress to determine when its guardianship shall cease;* and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of *what it deems the best interest of the Indian.*"

On March 3, 1871, 16 Stat. L., 566, section 2079, Revised Statutes, Congress enacted a law providing that "no Indian Nation or tribe within the territory of the United States shall be acknowledge or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Prior to this time the Government had recognized the Indian tribes as having some of the attributes of nations and entered into many treaties with them, but as was said by this Court in the case of *Heff*, 197 U. S., 488-509,

> *"from that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress."* (P. 498.)

The burden of the contention of the defendants below was that because the Government had granted citizenship to the Indians in Oklahoma, they have, therefore, been released from the guardianship of the Nation. The question of the relation of citizenship to the control or guardianship by Congress of the individual Indian was before this Court in the case of the *United States vs. Rickert*, 188 U. S., 432, wherein it was said:

> "It is said that the State has conferred upon these

> Indians the right of suffrage, and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of Government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political question which the courts may not determine."

In the case of *Ross vs. Eells,* 56 Fed., 855, the United States Circuit Court sustained the claim that certain members of the Puyallup tribe of Indians in the State of Washington, to whom allotments had been made, and who became citizens of the United States and also of the State when it was admitted into the Union, had been emancipated from the guardianship of the Government, but upon appeal to the Circuit Court of Appeals, the decision of the lower Court was reversed, the Appellate Court holding that:

> The act of February 8, 1887, which confers citizenship, clearly does not emancipate the Indians from all control or abolish the reservation.

and cited with approval a Massachusetts case and said:

> And it was held *in re Coombs,* 127 Mass., 278, that it was competent for the legislature to continue the guardianship by the State after they had been made citizens.

The *Coombs* case was appealed to this Court and was dismissed, 163 U. S., 702.

A recent case decided by this Court involving this same question is that of *Bowling vs. The United States,* 233 U. S., 528, wherein it was held that:

The guardianship of the Federal Government over an Indian does not cease when an allotment is made and the allottee becomes a citizen of the United States.

It may be, although it is not conceded but the contrary contended, that prior to the passage of the act of March 3, 1871, which declared that "no Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty," R. S. 2079, that the Government was only the guardian of the Indian tribe and not the guardian of the individual Indian, and his Indian property, but since the passage of that act, as was said by this Court in the case of *Heff, supra:*

> *"Of late years a new policy has found expression in the legislation of Congress*—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes free from national guardianship and charged with all the right and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume, and be subject to all the privileges and burdens of one *sui juris*, and it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress" (p. 499).

That the Government exercises guardianship over the individual Indian and his Indian property is also shown by the decision of this Court in the case of *Wiggan vs. Conolly*, 163 U. S., 56, wherein the Court sustained an act

of Congress extending the restricted period upon the alienation of lands allotted and patented by holding that:

> The land *and the allottee* were still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

In the case of the *Cherokee Nation vs. Hitchcock*, 187 U. S. 294, decided December 1, 1902, after the passage of the act of March 3, 1901, granting citizenship to the Indians in Indian Territory and the allotment act of July 1, 1902, this Court held that the act of March 3, 1901, granting citizenship to the Indians in the Indian Territory did not release them from the guardianship of the Government.

The guardianship of the Government over the Indians, whether allotted or not, can be to a great extent likened to the guardianship which the States exercise over incompetent citizens, and this similarity seems to have been recognized by this Court in the case of *Winters vs. The United States*, 207 U. S., 564, wherein the Court said:

> These acts of 1904 and 1906, and any other acts looking to the protection of the title of the full-blood Indians to the lands allotted to them, are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

CONTRACTS WITH A PART OR THE MAJORITY OF A CLASS AUTHORITY FOR REPRESENTING THE CLASS

SERVICES RENDERED BENEFITING ALL THE CLASS SHOULD BE PAID FOR BY ALL INDIVIDUAL INDIANS COMPOSING THE CLASS WHO RECEIVED THE BENEFIT OF THE SERVICES

The case of *Rollins et al. vs. United States*, 23 C. Cls., 106, was in fact a case against the United States and the Eastern Band of North Carolina Cherokee Indians. It was referred to the Court of Claims by the Secretary of the Interior under the Bowman Act. The Court of Claims found that "the claimants are entitled to the sum of ten thousand one hundred and seventy-six dollars and seventy-seven cents ($10,176.77) beyond what has been paid to them." The Eastern Band of North Carolina Cherokees were those Cherokee Indians who remained in North Carolina after the nation moved west and according to the decision of the Court of Claims in the case of the *Eastern Cherokees vs. United States and the Cherokee Nation*, 20 C. Cls., 449, "were not regarded by the treaty-making powers as forming a part of the Cherokee Nation" and in the statement of the case it is said that "it appears that the claimants are neither a sovereignty nor a body corporate nor an aggregation of individuals; that all tribal relations between them and the Cherokee Nation have been severed and that they are virtually citizens of the States east of the Mississippi." The latter case was appealed to this Court and the decision of the lower Court affirmed, 117 U. S., 288.

This North Carolina Cherokee case should be considered in connection with the Rollins case decided three years later

by the Court of Claims as hereinbefore mentioned and wherein the Court held that a contract executed by part of a class of Indians was authority for rendering services for all of the class.

In the Rollins case *supra* the contract was not signed and Rollins was not employed by all of the individual Indians concerned, but they all received the benefit of the legal services rendered. The Court of Claims held that all of the class of "Eastern Cherokee Indians" who had received the benefit of the attorneys' services and were enjoying the fruits of that labor should pay for such services. The contention, however, was made by the Government for the Indians, that the Indian who executed the Rollins contract was without authority to do so. The Court overruled this contention and did so, notwithstanding the fact that the Court of Claims three years prior thereto had held as heretofore mentioned that "it appears that the claimants (Eastern Cherokee Indians involved) are neither a sovereignty nor a body corporate, nor an aggregation of individuals; that all tribal relations between them and the Cherokee nation have been severed, and that they are virtually citizens of the States east of the Mississippi River." *The Eastern Band of Cherokee Indians* vs. *United States*, 20 C. Cls., 449.

The Cherokee Indians who remained east of the Mississippi River when the Cherokee Nation moved west are known as "Eastern Cherokees." The Choctaw Indians who remained east of the Mississippi River when the Choctaw Nation moved west are known as "Mississippi Choctaws." But the Government only carries on its rolls, on a separate roll, as "The Mississippi Choctaws" those Choctaw Indians who later moved to the western country and were enrolled and allotted as a result of the legislation here in question.

being in numbers 1,643. It is the Indians of this class of Choctaws with whom Winton and associates had contracts. It is this class of Choctaws carried on a separate roll who have received the benefit of their services and are now enjoying the fruits of ten years' labor on the part of their attorneys, Winton and associates.

In the case of the *Eastern Cherokee Indians vs. U. S.*, 27 C. Cls., 1, the Court of Claims held that "sovereigns, corporations and individuals, or aggregations of individuals may be parties litigant. The Eastern Cherokees are not a body politic, but as the former owners of communal property are now severally interested in a common fund." And in the case of the *Potawamie Indians vs. U. S.*, 27 C. Cls., 403, 411, the Court said that:

> In this jurisdiction the substance of proceedings rather than the form is the material consideration; and the object which Congress had in the passage of the law will be accomplished if possible.

The Court of Claims very properly said in the case of the *Mille Lac Chippewas vs. U. S.*, 47 C. Cls., 415, 460, that

> Courts are constrained to give effect to jurisdictional statutes where the intent of the legislature can reasonably be inferred from the language thereof to vest authority to judicially ascertain the merits of the controversies. *Supervisors vs. Stanley*, 105 U. S. 305. Doubts are to be resolved in favor of jurisdiction, unless some established law is violated. *Endlich on Statutory Construction*, section 430; *Butler and Vale vs. U. S.*, 43 C. Cls., 497.

UNITED STATES—PARTY DEFENDANT.

On March 4, 1911, Messrs. Ralston & Siddons, attorneys for one of the claimants below, filed a motion to make the

United States a party defendant, R. 93. On March 25, 1911, the defendants filed a brief in opposition to said motion. March 30, 1911, argument was had on said motion to make the United States party defendant.

The above motion being undecided on February 20, 1915, the original claimants (appellants here) moved the Court to amend the petition by making the United States a party defendant, and on May 29, 1916, in the opinion of the Chief Justice it was held that "the United States cannot be made defendant in this proceeding," R. 93-94-188.

In the case of *Green vs. the Menominee Tribe of Indians*, 46 C. Cls., 68, and 47 C. Cls., 281, the United States does not in the style of the case appear as a party defendant. The Green case was appealed to this Court and was decided on May 11, 1914, 233 U. S., 558. The style of the case as given in this Court's opinion is as follows: "F. F. Green, appellant, *vs.* the Menominee Tribe of Indians in Wisconsin, and the United States," the Court of Claims having permitted Green by motion to amend the petition making the Government a party defendant.

The jurisdictional act in the *Menominee case*, 35th Stat., 444-445, did not make the United States a party defendant and did not even authorize or direct the Attorney General to appear and defend the Menominee Indians. Both jurisdictional acts in the present case provide that *"the Attorney General shall appear and defend the said suit on behalf of the said Choctaws,"* R. 96-97.

CONCLUSION

The Court below held that the services rendered by Winton and associates in behalf of the Mississippi Choctaws' right to citizenship in the Choctaw Nation were such as to bring those services within the ruling in the Trist case *supra*. In the Trist case the facts showed a secret effort

to lobby a private claim through Congress. *The record in the present case shows printed Memorials presented to Congress and published by Congress as Congressional documents.* These memorials set forth legal argument in behalf of the Mississippi Choctaws' right to citizenship in the Choctaw Nation and were professionally made as an attorney would present a similar case to a court. In fact the record shows that Winton and associates represented the Mississippi Choctaws not only before Congress and its committees but before the Courts, the Dawes Commission and the proper officials of the Choctaw Nation and of the Government of the United States. Whether these services referred to in the findings of fact as made by the Court below come within the ruling of this Court in the Trist case *supra* can best be shown by the Memorials and Committee reports made on the question of the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation. Two Memorials are set out in the findings made by the Court below and two more referred to but not set out. These Memorials and Committee reports are Congressional documents with the exception of the Memorial of 1897 mentioned in finding "XII," R. 101. The said Memorial of 1897 and said Congressional documents are set out in the appendix filed in connection with appellants' motion to remand for additional findings and are as follows.

The Memorials of December, 1896, and January, 1897, are set out in the record, R. 155, Memorial September, 1897, set out in the appendix to appellants' Motion to Remand, page .....

The Congressional documents as described in the Winton Memorial presented to the House of Representatives on March 15, 1904, H. R. Doc. 614, 58th Cong., 2d Ses., are as follows:

House Record 3080, 54th Con., 2d Ses.
House Bill 10372, Senate Doc. 129, 54th Cong., 2d Ses.
House Doc. 274, 55th Con., 2d Ses.
Public Act 162 approved June 28, 1898, Curtis Act.
House Doc. 426, 56th Cong., 1st Ses.
Senate Doc. 263, 56th Cong., 1st Ses.
Indian Appropriation Act approved May 31, 1900.
H. R. Doc. 2522, 56th Con., 2d Ses.
H. R. Doc 490, 56th Cong., 2d Ses.
Senate Doc. 319, 57th Cong., 1st Ses.
Choctaw-Chickasaw Agreement Public Act 228, approved July 1, 1902; sections 41, 42, 43 and 44 referring to the Mississippi Choctaw matter.

See appendix to Appellants' Motion to Remand, page.....

It is therefore submitted that the Court below erred as set out in the Assignment of Errors and that the decision of said Court should be reversed and the case remanded for additional findings with instructions to render judgment thereon, as well as on the findings of fact made by that Court on May 29, 1916.

Respectfully submitted,

WILLIAM W. SCOTT,
Attorney for Appellants.

I hereby acknowledge receipt of copy of brief hereinbefore set out this ..... day of October, A. D. 1918.

.....
Solicitor General United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

WIRT K. WINTON, ADMINISTRATOR OF the Estate of Charles F. Winton, Deceased, and Others, appellant,
v.
JACK AMOS AND OTHERS, KNOWN AS THE Mississippi Choctaws.
No. 924.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES IN OPPOSITION TO APPELLANT'S MOTION FOR WRIT OF CERTIORARI.

Appellant moves for a writ of certiorari requiring the Court of Claims to certify as part of the record:

1. The tentative findings of fact of that court filed December 7, 1914.

2. The intermediate findings of fact filed May 17, 1915.

3. Plaintiff's proposed amendments to said findings of fact of May 17, 1915, filed August 9, 1915.

Appellees submit that the motion should be disallowed for the reasons:

1. That the Court of Claims is required to certify as part of the record only its ultimate findings of fact, and not tentative and intermediate findings of fact as requested by appellant.

2. That the action of the Court of Claims upon all of the proposed amendments filed by plaintiff on August 9, 1915, is fully disclosed by the record as it now stands.

3. That the amendment to the finding of fact specifically requested to be certified as part of the record is fully set out in the answer of the court in its opinion of January 29, 1917 (pp. 12–14), and now a part of the record.

STATEMENT.

This suit was brought in the Court of Claims under section 9 of the act of April 26, 1906, 34 Stat. 140, against the Mississippi Choctaws for services rendered and expenses incurred in the matter of their claims to citizenship in the Choctaw Nation.

The matters with which the present motion has to do concern the finding of the terms and purport of certain contracts between Robert L. Owen and Charles F. Winton, as to their respective and reciprocal rights and duties in reference to the representation of the claimant Indians—contracts in themselves foreign to the main issue.

The Court of Claims in its tentative findings, filed December 7, 1914, made the following finding relative to the two contracts between plaintiff Winton and his associate Owen:

IX.

> Thereafter, on June 23, 1896, Robert L. Owen entered into an agreement with Charles F. Winton to proceed to Mississippi and secure

contracts with such Indians there resident as might be entitled to participate in any distribution of the lands or moneys of the Choctaw or Chickasaw Nations, Winton binding himself to secure the evidence, powers of attorney, and contracts as prescribed by said Robert L. Owen, said Owen to provide the funds and Winton to receive one-half of the net proceeds of the contracts. This agreement was modified July 23, 1896, by a second contract between the same parties, in which it was provided that Winton should act as attorney in Mississippi Choctaw cases under his agreement with Owen; that said Owen should have a one-half interest in all of said contracts; and in the event of accident to Winton, that Owen should have full authority to take up all Mississippi cases in place of Winton.

As to this Owen had previously testified as follows:

Immediately after the passage of this act, to-wit, on June 23, 1896, I made a contract with Charles F. Winton, the original of which I will present during the course of my testimony and make it a part thereof. On July 23, 1896, I made a further contract with Charles F. Winton at Cleveland, Okla., modifying the first contract, the original of which I will present during the course of my testimony and make it a part thereof. * * * The first contract referred to binds Charles F. Winton to proceed to Mississippi and secure contracts with such Indians as may be entitled to participate in any distribution of the lands or moneys of the Choctaw and Chickasaw Nations and binding

himself to secure the evidence, powers of attorney, and contracts as prescribed by me, Robert L. Owen. This agreement was based upon the understanding that I should make advances of money necessary to carry on this enterprise, and provided that Winton himself should be entitled to receive one-half of the net proceeds of such cases. * * *

The contract of July 23, 1896, signed by Charles F. Winton and myself at Cleveland, Okla., provides that Winton shall act as attorney in the Mississippi Choctaw cases under agreement of Robert L. Owen; that said Owen has one-half interest in said contracts without exception, and in the event of any accident to Winton, has full authority to take them up in place of Winton, etc. (Rec. p. 290).

On May 17, 1915, the Court of Claims filed findings of fact and conclusion of law dismissing each of the several petitions and intervening petitions, on the ground that in none of the claims was any liability on the part of the Mississippi Choctaws as a class established.

On August 9, 1915, plaintiff filed a motion to amend the findings of fact of May 17, 1915, and the amendment relating to Finding IX upon the following grounds:

FINDING IX.

Amend finding nine, paragraph 4, line 7, by inserting after the word "funds" the following: "and represent the claims of these people (Mississippi Choctaws) before the proper officers of

the United States or Indian governments, and in which representation the said Winton was to assist and cooperate with the said Owen. (Rec. 320–321, Ex. 11)."

The above amendment is based upon the contract between Winton and Owen, and uses practically the same language as does said contract. The finding, as now stated, does not state in any way whatever the services to be rendered by Owen and in fact it infers that Owen was only to provide the funds. It is therefore very material that the Court should make this amendment in order to show what services were contemplated to be rendered by Owen at the very beginning of the struggle, or the "long and somewhat furious contest" to obtain from the Mississippi Choctaws rights to citizenship in the Choctaw Nation. (Rec. Vol. 11, pp. 77, 78).

Defendants filed objections on November 15, 1915, to various proposed amendments to the findings of fact of May 17, 1915, filed by the plaintiff on August 9, 1915, upon the general grounds that the facts requested to be found were already contained in said findings or were immaterial, and specifically urged against the amendment to Finding IX that—

The court is requested to amend Finding IX by inserting after the word "funds" in the seventh line a statement taken from a contract of employment between Messrs. Owen and Winton as showing what they undertook to do for the Indians, in other words, to show by inference that they represented the Mis-

sissippi Choctaws collectively. It is a fact, however, that when Mr. Winton went to Mississippi instead of making contracts with the Choctaws as a body, he took contracts with individual Indians and filed them as an exhibit to his petition. The reason for this course has been given by Mr. Owen himself, who says: "It was impossible, of course, for the Mississippi Choctaws to act in any other way, since they had no organization that could bind them as a body." (Rec. pp. 2574, 2575).

The contracts were taken in a series from 1 to 834, embracing 2,000 individuals, of whom the court has found that 696 were enrolled and received allotments. (Finding XXXIII.) What Winton and his associates agreed to do for the individual Indians, and the compensation they agreed to give him, is shown by the contracts between Winton and the Indians, and not the contracts between Mr. Owen and Mr. Winton. (Rec. vol. 11, pp. 198, 199).

On May 29, 1916, claimant's motion to amend the findings of fact was allowed in part and overruled in part; the former findings of fact were withdrawn and amended findings of fact were filed with a conclusion of law dismissing each of the several petitions and intervening petitions, with an opinion by Judge Booth and a concurring opinion by Chief Justice Campbell. The motion to amend Finding IX was overruled. That finding is identical with the tentative finding of December 7, 1914, the intermediate finding of May 17, 1915, and the ultimate finding of May 29, 1916.

On July 25, 1916, plaintiff filed a motion for a new trial, which was overruled on December 11, 1916.

On January 8, 1917, plaintiff filed a request for findings of fact on certain questions of fact. The question of fact relating to Finding IX reads:

IX.

> Whether or not the original contract made June 23, 1896, and modified July 23, 1896, between Charles F. Winton and Robert L. Owen, provided that said Owen was to represent the claims of the Mississippi Choctaws before the proper officers of the United States and Indian Governments, and in which representation the said Winton was to assist and cooperate with the said Owen. (Rec. 320–321, Ex. 11; vol. 11, pp. 77–78.)

The questions of fact were answered by the Court of Claims in an opinion delivered by Judge Booth on January 29, 1917, now a part of the record. In his answer to question 9 (p. 12), relating to Finding IX of the ultimate findings of fact, he set out in full the two contracts between Winton and Owen of June 23, 1896, and July 24, 1896, and explained that they were not incorporated in Finding IX because they were not in the files of the court, having been withdrawn by the attorney of record for plaintiff, who afterwards died; that they were found among his papers and only returned to the court upon request after the filing of the request for findings of fact on questions of fact by the plaintiff. (Op. of Jan. 29, 1917, pp. 12–14).

ARGUMENT.

The filing of the motion for the writ of certiorari in this case appears to have resulted from exception taken by appellant to the following language of Judge Booth in the first paragraph of his answer to question 9 in the opinion of January 29, 1917:

> Finding IX of the court is exactly the same as it appeared in the tentative finding of December 7, 1914. Counsel for claimant, in his brief filed January 21, 1915, made no objection to the same, and in open court on the oral argument stated "No objections" (p. 12).

The objection of appellant to this statement is that while the answer is technically correct as to the tentative findings of December 7, 1914, the court erred in making no reference to plaintiff's proposed amendment to the intermediate finding of May 17, 1915; that for this reason appellant moves the court to certify all of the plaintiff's proposed amendments filed August 16, 1915, to said findings of May 17, 1915. (Appellant's brief, pp. 6 and 7.) The substance of the two contracts of association between Winton and Owen was found by the Court of Claims in almost the identical language of Mr. Owen in Finding IX of the tentative findings of December 7, 1914, and plaintiff made no objection to that finding. It was repeated in Finding IX of the intermediate findings of fact filed by said court on May 17, 1915. Plaintiff thereupon filed a proposed amendment thereto which was overruled. The finding was again repeated in Finding IX of the ultimate findings of

fact of said court filed May 29, 1916. Plaintiff filed a proposed amendment thereto in the form of a question, being a repetition of the amendment previously requested. The court acted upon this proposed amendment by setting out both contracts in full in its reply to question 9, made part of the opinion filed January 29, 1917, which is part of the record here.

The Court of Claims is required by the rules of this court to certify only its ultimate findings of fact as part of the record on which the case shall be tried in this court. There is no rule of this court which requires the lower court to certify as a part of the record its tentative, or intermediate findings of fact, or proposed amendments to its findings of fact as appellant is now asking this court to have done.

This court has frequently stated that it will not go behind the findings of fact of the Court of Claims (*McClure* v. *United States*, 116 U. S., 145; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150; *Sisseton and Wahpeton Indians*, 208 U. S. 561, 566); but if any facts material to the decision of the case, requested to be found, have not been acted upon by that court, such alleged facts may be referred to said court to determine whether or not they are sustained by the evidence. (*United States* v. *Adams*, 9 Wall, 661; *United States* v. *Driscoll*, 131 U. S., Appendix clix; *Ripley* v. *United States*, 220 U. S. 491; *id.* 222 U. S. 144.)

It is therefore apparent from the foregoing statement that all of the material facts requested by appellant to be certified by the Court of Claims are now part of the record, or have been properly excluded therefrom by the lower court.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

APRIL, 1917.